IN THE SUPREME COURT OF THE UNITED STATES

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CHERYL K. PLILER, WARDEN, :

Petitioner :

v. : No. 03-221

RICHARD HERMAN FORD. :

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Washington, D.C.

Monday, April 26, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

PAUL M. ROADARMEL, JR., ESQ., Deputy Attorney General, Los Angeles, California; on behalf of the Petitioner.

LISA M. BASSIS, ESQ., Los Angeles, California; on behalf of the Respondent.

Alderson Reporting Company, Inc.
1111 14th Street, N.W. Suite 400 1-800-FOR-DEPO Washington, DC 20005

C O N T E N T S

P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 03-221, Cheryl Pliler v. Richard Herman Ford.

Mr. Roadarmel. Am I pronouncing your name correctly?

ORAL ARGUMENT OF PAUL M. ROADARMEL, JR.

ON BEHALF OF THE PETITIONER

MR. ROADARMEL: Yes, Mr. Chief Justice.

Mr. Chief Justice, and may it please the Court:

In 1996 the Antiterrorism and Effective Death Penalty Act, or AEDPA, was enacted, which imposed a 1-year limitation period upon the filing of Federal habeas petitions following the finality of a State criminal conviction.

In Duncan v. Walker, this Court held that the 1-year limitation period may be tolled during the pendency of a properly filed State post-conviction or other collateral application, but not during the pendency of a Federal habeas application.

Despite that holding, the Ninth Circuit in this case concluded that the district court's dismissal of admittedly mixed Federal habeas petitions was improper and prejudicial because the district court did not provide

certain advisements designed to effectuate the Ninth Circuit's practice of stay and abeyance.

QUESTION: Is there some peculiar virtue about the word advisements as opposed to advice?

MR. ROADARMEL: No, not in this particular situation, Your Honor.

We believe stay and abeyance is incompatible with this Court's precedent, as well as AEDPA, for four reasons.

QUESTION: Before we get to that, do you agree that some kind of remedy is required here, warnings or no warnings, as a result of the fact that what the judge did tell the -- the defendant in this case seems to have been just affirmatively misleading. He said you -- dismiss and then you can come back when it was perfectly clear, that -- that he could never come back that the time in -- in all practical terms would have run. Haven't we got to do something or hasn't the courts got to do something to correct that?

MR. ROADARMEL: We don't believe that the advice was misleading or erroneous in this case.

QUESTION: Well, is -- is there any chance --

QUESTION: Well, is that issue still open? I mean, even if you're correct on your premise that a court doesn't have to inform a defendant of the statute of

limitations, is -- is the issue of possible misleading of the defendant open on the remand even if you were successful?

MR. ROADARMEL: No, we don't believe it would be.

QUESTION: Well, shouldn't it be? I mean, if -- if we think that the record shows there is some evidence of misleading where the defendant expressed concern about a statute of limitations problem and was told it wouldn't present a problem, when in fact it did -- it had already run -- you don't think that should be open on remand?

MR. ROADARMEL: If that were the case, perhaps that would be the situation or perhaps that would be the remedy. That wasn't the case here. The district court told Ford that he could refile his petitions following exhaustion and dismissed the mixed petitions without prejudice.

QUESTION: But it wasn't without prejudice. For all intents and purposes, he could never come back because the statute of limitations, as I understand the facts, had already run before the case was even dismissed in the district court. So he could never come back. Therefore, without prejudice was surely misleading.

MR. ROADARMEL: No. Dismissal without prejudice merely means that the petitioner can refile. It will be a

separate issue as to whether the claims of the petition that he refiles will be considered on its merits.

QUESTION: Do you think any person in the prisoner's position would conceivably have understood the statement as you have just defined the term, without prejudice?

MR. ROADARMEL: Yes. I --

QUESTION: I mean, maybe somebody who -- who had three law degrees could figure that out, but a defendant standing certainly isn't going to understand that.

MR. ROADARMEL: Well, that -- that has always been the procedure when courts have addressed mixed petitions. They have always dismissed them without prejudice.

QUESTION: And they have always made a statement that was affirmatively misleading?

MR. ROADARMEL: There is no statement here, we believe, that was affirmatively misleading.

QUESTION: I mean, we -- we may agree with you that the court does not have to give warnings. That's -- that's a -- that's an open question. But surely the court is -- is not free to make misleading statements.

MR. ROADARMEL: Well, the court --

QUESTION: We need to -- let me put it this way. Wouldn't any defendant in his right mind, if he had known

that he could not come back into court, that the statute had run, at least have said, well, judge, get rid of the unexhausted claims so that I can at least litigate the ones which I have filed in time and which are exhausted? Wouldn't that have been the only sensible thing for him to do if -- if he had understood what you understand?

MR. ROADARMEL: Not necessarily. A Federal habeas petitioner may believe, in fact, that his exhausted claims are unmeritorious or frivolous compared with the claims that he wishes to exhaust in State court. So there may be circumstances where a Federal habeas petitioner will not, in fact, object to the dismissal of even his exhausted claims or to the -- the dismissal of an entire petition.

QUESTION: May I ask you about the unexhausted claims that have to go first to the State court? When Rose v. Lundy was decided, this problem of time didn't exist because there was no statute of limitations on Federal habeas. Now that there is this bind, why isn't it appropriate to say the stay and abeyance applies not simply to the Federal claim but to the entire complaint, which is -- is the ordinary rule when there's a -- a prior action pending or abstention? Usually the -- the whole complaint just sits in Federal court till the State court is through. Why shouldn't this, now with the statute of

limitations, the 12 months, in the picture, be the same way?

MR. ROADARMEL: I think there are two responses to that. The first is that Congress would not have contemplated that procedure because Congress, in incorporating section 2254(b)(1) in virtually unaltered form, would have contemplated Rose v. Lundy's application in the way it had always been applied by this Court.

The second response is that a stay of the proceeding under those circumstances would make sense only if the claims that are being dismissed as unexhausted can be added back and would, in fact, be --

QUESTION: So not added back. I mean, this is the Third Circuit's solution, and I'm asking you why isn't that the simplest way to deal with this. Nothing is added back. Everything, the entire complaint sits in Federal court while the petitioner goes over to State court to exhaust the State claims and then comes back to the Federal court with nothing to supplement. The complaint is already there.

MR. ROADARMEL: That procedure guts Rose v. Lundy and AEDPA. Rose v. Lundy would have absolutely no meaning under that procedure because Rose v. Lundy never contemplated that procedure. It contemplated the complete dismissal of a mixed petition or, at most, the dismissal

of unexhausted claims from a mixed petition.

QUESTION: But coming -- with the ability to come back, which was not a problem then because there was no statute of limitations.

MR. ROADARMEL: Well, even prior to the enactment of AEDPA, refiled petitions would not necessarily be considered on their merits. Claims could be procedurally defaulted, for instance, and if the default was based upon an adequate and independent State ground, the claims would not be considered on their merits, but would be summarily denied. So even prior to the enactment of AEDPA, this Court contemplated that refiled petitions would not necessarily be considered on their merits.

But --

QUESTION: I mean, just to elaborate on Justice Ginsburg's question, what is your answer to her point? Why -- imagine the imaginary author of Rose v. Lundy. When I read this, I think they're worried about exhausting the State claim so the State will have a chance to pass on it. All right. Now, what Justice Ginsburg just said gives the State the chance to pass on it. What is it in Rose v. Lundy that cares whether the way you give the State to pass on it is to dismiss the whole thing and let them pass on it or hold it on the docket and let them pass

on it or call them into your office, any other thing you can think of? I mean, what is it in Rose v. Lundy that cares how you give the State opportunity to pass on it as long as they pass on it?

MR. ROADARMEL: Because Rose v. Lundy contemplates the unexhausted claims will be presented in State court first, and it enforces or promotes that through what this Court has referred to in Rose v. Lundy as a rigorously enforced total exhaustion requirement. Now, if the petitioner can simply file a mixed petition in Federal court without any consequences either under Rose v. Lundy or under AEDPA, what we will have is a situation where petitioners have an incentive to file mixed petitions in Federal court instead of presenting their unexhausted claims in State court first.

Contrary to this Court's holding in Duncan v. Walker that AEDPA is not indifferent between State and Federal filings, but promotes and encourages the filing of unexhausted claims in State court first --

QUESTION: I guess Rose v. Lundy could have -- could have said what is now being proposed if it had wanted to. I mean, Rose v. Lundy could have said -- instead of you have to dismiss the whole thing, they could have simply said, you know, hold it abeyance.

MR. ROADARMEL: Yes. And in fact, this Court

has always disapproved of stays of -- of mixed petitions.

QUESTION: So -- so you think --

QUESTION: So, of course, there was no statute of limitations in place when Rose was decided. There would have been no point to put that in the opinion when there was no statute of limitations in place.

MR. ROADARMEL: That's correct, but --

QUESTION: Well, presumably Congress knew about Rose v. Lundy when it enacted AEDPA and didn't indicate any change in Rose v. Lundy.

MR. ROADARMEL: No. And Congress certainly, if it had desired a stay or contemplated a stay of proceedings pending exhaustion, could have put something into AEDPA that --

QUESTION: Is -- is there any indications when they passed AEDPA, that the Congress was aware of the fact that like two-thirds of all petitions are filed incorrectly in the Federal courts because they don't know where to go? I mean, these are not legally represented people. Is -- I mean, I'd be interested in that. Is there information there that suggests Congress focused on that and said, we don't want to -- we -- we just want to -- is there or not?

MR. ROADARMEL: There's nothing in the congressional record to indicate that as to what

individual Members of Congress had before them in terms of studies or other data at the time AEDPA was crafted. I'm not aware. But the congressional record doesn't speak to that.

But certainly Congress --

QUESTION: Counsel, you're asking us in this case to say that the stay and abeyance procedure is -- is not a valid procedure.

MR. ROADARMEL: Yes.

QUESTION: And yet, it didn't occur in this case. Here Mr. Ford chose dismissal without prejudice. There was not a stay and abeyance used here. Why should we rule on that?

MR. ROADARMEL: Because it's --

QUESTION: I mean, it's just you're asking us to reach beyond the confines of this case in doing that.

MR. ROADARMEL: Because the correctness of the Ninth Circuit's advisement requirements can't be adequately addressed or intelligently addressed without understanding what it is they promote and without understanding what the practice is of the Ninth Circuit.

QUESTION: I would think it would. We have a question here of whether some particular advice was required, yes or no, and I don't see how we get into stay and abeyance in this case properly.

MR. ROADARMEL: Well, because --

QUESTION: Six of the seven circuits allow it I know, but I don't see how we -- we get into it here.

MR. ROADARMEL: Because the Ninth Circuit majority concluded that the failure to advise in the manner in which they thought was appropriate was improper and prejudicial because they assumed that had the advisement been given with regard to the dismissal of unexhausted claims as a precondition to the consideration of a motion to stay, that Ford would have dismissed his unexhausted claims. And in doing so, the district court would have been required to grant the motion to stay. In fact, the majority concludes it would have been abuse of discretion not to do so. So it's inextricably bound in the advisement requirement in this case.

QUESTION: But we could rule, I suppose, that the advice was unnecessary when leaving open the question of whether the stay and abey proceeding is permissible or desirable, whatever.

QUESTION: Right.

MR. ROADARMEL: Yes, I believe that's true.

QUESTION: And there's also a second question presented about the relation back. I -- I hope you'll take an opportunity to state your point of view on that.

MR. ROADARMEL: Yes. The Ninth Circuit, after

concluding that the advisements that were given in this case were inadequate and misleading, fashioned a remedy for that particular error which it believed occurred by way of applying rule 15(c) of the Federal Rules of Civil Procedure in a manner that no other circuit court has ever applied before. In fact, three prior panels of the Ninth Circuit itself concluded that relation back would not apply under these circumstances because there's nothing to which the subsequent proceeding can relate back.

QUESTION: But the Ninth Circuit did that only because their own precedents said all you can stay is the Federal claim. You can't stay the entire petition. That's was the preliminary to doing this fancy 15(c) application.

MR. ROADARMEL: Yes, but in doing so, what the Ninth Circuit majority did was have a subsequent proceeding relate back to a prior proceeding that had been dismissed and was no longer pending.

QUESTION: If the Ninth Circuit decided or if we decided that equitable tolling is permissible in this case, what -- what procedure should be adopted to reflect that rule? I know that's maybe not -- not your position, but if that -- if that were the holding, how -- how would that work? And -- and how is that any different than relation back?

MR. ROADARMEL: Well, it's -- it's difficult to say because equitable tolling has been applied differently in different situations. The Ninth Circuit itself applies it in a very different fashion than it was applied in this case. I suppose equitable tolling could be applied to toll the limitation period during the pendency of the first set of proceedings, the 1997 proceedings, up to the time that the claims were -- or the petitions were dismissed as unexhausted. That would leave Ford with 5 days to file his unexhausted claims in State court, exhaust, and -- and then return with those claims to Federal court.

QUESTION: Let -- let me ask you this somewhat related question. You look at the records that the -- that's presented -- the petitions that are presented to the district courts through their magistrates, and they're bewildering. The petitioner really restates a claim in three or four different ways to make sure he's left nothing out. And the -- the district courts are -- are very busy.

Suppose you have a sort of Johnny-on-the-spot, prompt attorney at -- at the habeas level in a Federal court and he files on day one. He has got a year but he files on day one. The district court just doesn't get around to it until, say, the 10th month, and then it says,

oh, well, this has -- this has some unexhausted claim. Any relief for the -- or even on day 360. Any relief available there for the petitioner?

MR. ROADARMEL: It certainly wouldn't appear to be the case under AEDPA because AEDPA doesn't toll the limitation period during pendency of the Federal habeas proceeding, and that's very clear, we believe, from the statute itself. So an individual filing a petition in Federal court is well advised, of course, to ensure that all the claims are fully exhausted.

The Eighth Circuit in Akins v. Kenney suggested that where a petitioner is concerned that any of his claims may be unexhausted, he's well advised under AEDPA to present those claims in State court first and accomplish two goals simultaneously. First, he exhausts beyond any doubt, and second, he tolls the limitation period during the pendency of that proceeding.

QUESTION: But -- but in my hypothetical district judge number one rules in a week. District judge number two waits 300 days. The petitioner is in the same position in either case in your view.

MR. ROADARMEL: Yes, because I think the petitioner has to contemplate the vagaries of any kind of judicial interpretation or ruling on his matters, and that may depend upon the particular court. It may depend upon

the caseload. It may depend upon the particular matter that's put before the court, the number of claims, the complexity, and so on. That's always going to vary in any case. A petitioner who files a one-claim petition will most assuredly receive a quicker resolution of that than the petitioner who files a 200-page petition containing hundreds of claims. That's just in the nature of any kind of adjudication in any kind of court.

And that has to be contemplated and anticipated by any would-be Federal habeas petitioner because if that petitioner files a mixed petition under AEDPA, the clock keeps ticking during the pendency of that Federal habeas proceeding no matter how long or how short. So, again, he's well advised, as the Eighth Circuit noted, to file any claims that he's unsure about in State court first. And that's what AEDPA contemplates, as this Court concluded in Duncan v. Walker.

To allow petitioners to file mixed petitions in Federal court without any consequences and -- and to do so in the manner in which the Ninth Circuit contemplates it here and in other cases would eviscerate AEDPA's limitation period because, as we point out in our briefing, a petitioner could well file a mixed petition containing only one exhausted claim, confident that all of his unexhausted claims will be purged from the petition,

the remaining exhausted claims stayed, and those purged claims, following exhaustion, will be added back to the State petition, no matter that they were pursued in State court after the expiration of the limitation period, and they will be deemed timely by the Ninth Circuit.

QUESTION: Well, of course, that -- that would -- that may well be the Ninth Circuit rule, but you could also have a stay and abey rule in which in order to -- to grant the petitioner time to go back and -- and litigate the State claims, he has to make a -- a showing first that there is some reason to excuse his delay, in other words, a -- a kind of an equitable tolling argument at the threshold. And -- and if -- if that were the requirement, then the -- the scenario that you just -- just outlined would -- would not be an objection.

MR. ROADARMEL: Well, I think the problem with that approach, first of all, with regard to the application of equitable tolling to AEDPA, is that AEDPA itself doesn't contemplate the application of such tolling.

QUESTION: So you're -- you're saying that -- that there cannot be equitable tolling under AEDPA?

MR. ROADARMEL: It certainly seems foreclosed by this Court's holdings in United States v. Beggerly, United States v. Brockamp, and Lampf v. Gilbertson. In all of

those cases, this Court concluded, in reviewing Federal limitation periods, that because the statutes contain tolling provisions within them, it would be inconsistent, incompatible with those statutes to apply equitable tolling. Congress had spoken as to the circumstances under which tolling could be applied.

In Beggerly, in particular, this Court concluded that under the Federal Quiet Title Act, equitable tolling would be inapplicable because there was already an accrual or tolling provision built in that provided that the limitation period did not begin to run until the plaintiff knew or reasonably should have known of the claim of the United States.

AEDPA contains a very similar provision in section 2244(d)(1), subsection (D), which provides that the limitation period does not begin to run until the petitioner was aware of the factual predicate of the claim or claims through the exercise of due diligence.

In Brockamp, this Court commented upon the tolling provisions in the IRS tax refund statute and noted that because they were numerous and very specific, equitable tolling likewise would be incompatible with the statute.

AEDPA also contains very specific tolling provisions, beyond the one that I just described, tolling

where there is a properly filed State post-conviction or other collateral application, tolling where, for instance, unconstitutional State action leads to an impediment to filing, tolling where this Court issues a ruling on an issue of Federal constitutional law that's made retroactively applicable to cases on collateral review.

QUESTION: Leaving aside tolling, you said something I didn't quite grasp; that is, if you allowed the Federal petition to sit while you went to State court, all this is well within the 12-month period. You're in State court, you exhaust everything there. The statute is tolled during that time. Then you come back to Federal court and you -- as long as you're still within the 12 months, you're okay. It doesn't gut the statute of limitations. It just recognizes that it's tolled while you're in State court.

MR. ROADARMEL: I'm sorry. I misunderstood your hypothetical, Your Honor. If claims are presented in State court, prior to the expiration of the limitation period, yes, they will toll the limitation period. The problem with stay and abeyance under that situation, however, is that it actually gives the petitioner greater benefits under AEDPA than he received prior to the enactment of AEDPA.

Prior to the enactment of AEDPA, mixed petitions

in -- in certain circuits would actually, instead of being dismissed, have their unexhausted claims purged, and the petitioner would go back to State court and exhaust those claims. But the purged petition, the purged Federal habeas petition, would go forward and be resolved expeditiously. It would not be stayed.

And that I think was the basis of the plurality's warning in Rose v. Lundy that where a petitioner chooses that course of action, he will be barred from having his refiled claims considered on the merits because they will consist of a second or successive application. They will consist of a second or successive application only if the purged Federal habeas petition goes forward. If it's stayed, there will never be a second or successive application relating to those claims. And that would, I think, vitiate not only rule 9(b) of the rules governing --

QUESTION: Are you now questioning the propriety of -- let's just stick with the Rose v. Lundy the way it was. You have the Federal claim and the State claims. You lop off the State claims. Are you saying the Federal court can't say, well, I'm going to let this Federal claim sit until the State is through? Why should I adjudicate it? Maybe he'll prevail on some claim in the State court.

MR. ROADARMEL: Well, this Court has never

intimated that that won't be appropriate procedure. In fact, under Rose v. Lundy, in --

QUESTION: That it would or wouldn't?

MR. ROADARMEL: It would not. In -- in McCleskey v. Zant, when this Court talked about second or successive applications and abuse of the writ, it contemplated or presumed that that procedure followed under Rose v. Lundy would lead to those refiled claims constituting second or successive applications.

QUESTION: So are you saying that the Federal court would have no choice under the -- we'll keep the Federal claim in Federal court, no choice but to go full steam ahead on that claim?

MR. ROADARMEL: I think so because to do otherwise would be inconsistent with Rose v. Lundy, rule 9(b), but it would also be inconsistent with AEDPA because AEDPA contains a provision in section 2244(b)(1) of title 28 of the United States Code that requires claims that are dismissed from an initial petition and submitted as a second or successive application to be dismissed.

If we're always going to stay mixed petitions, pending the exhaustion of even timely presented unexhausted claims, it certainly leads one to wonder what the purpose of section 2244(b)(1) would be. That also appears to contemplate what the plurality suggested in

Rose v. Lundy, which is that the purged Federal habeas petition goes full speed ahead, to use your words, and that it's not, in fact, stayed.

To stay the Federal habeas petition under those circumstances would also result in delay, which is something that is inimical to AEDPA. As a number of lower courts have pointed out, one of the primary purposes of AEDPA is to tighten the Federal habeas process.

QUESTION: Am I wrong in thinking some Federal courts did that and after exhaustion was over, the case came back and -- with now the State claims added in?

MR. ROADARMEL: No, you're not wrong in thinking that. In fact, the Third Circuit in Crews v. Horn follows that particular procedure.

QUESTION: The Third Circuit follows what I -- I suggested to you might, in this post-AEDPA world, be appropriate, that is, to say we're going to stay -- we're going to let the whole complaint sit here.

MR. ROADARMEL: Yes.

QUESTION: Not -- we're not going to lop off the State claims. We just won't turn to it till the State gets finished.

MR. ROADARMEL: Yes, that's correct.

Unless the Court has any further questions, I'd like to reserve the balance of my time for rebuttal.

QUESTION: Very well, Mr. Roadarmel.

Ms. Bassis, we'll hear from you. Am I pronouncing your name correctly?

ORAL ARGUMENT OF LISA M. BASSIS

ON BEHALF OF THE RESPONDENT

MS. BASSIS: Yes, you are, Mr. Chief Justice.

Mr. Chief Justice, and may it please the Court:

When this Court adopted the total exhaustion rule in Rose, there was no statute of limitations for the filing of Federal habeas petitions, and a prisoner seeking to file a second Federal petition, after fully exhausting State remedies, faced no time bar. But AEDPA added to the mix a 1-year statute of limitations, which in many cases, such as Mr. Ford's, converts the choices under Rose into a complete bar on Federal habeas corpus review.

QUESTION: Well, isn't it reasonable to -- at least one view, to think that Congress -- we think Congress legislates in the light of existing law or existing rules from this Court, that that's exactly what Congress intended?

MS. BASSIS: No, I disagree, Your Honor. What Rose said is that a prisoner be afforded a choice, and that choice involves either proceeding on exhausted claims and deleting the unexhausted or dismissing the petition without prejudice to a right to return.

No one ever suggested in Rose that the petitioner would lose the right to have even his exhausted claims heard on the merits. In order to avoid the exhaustion requirement from becoming what would, in effect, be a trap for the unwary pro se prisoner requires nothing more than adding a sentence to what Rose already requires, a sentence made critical by AEDPA, which was nonexistent at the time of Rose.

There is no need for warning, however, if the court issues a stay. The lower courts almost unanimously do so and endorse State procedures where the failure to do so would result in a forfeiture of the right to Federal habeas review.

QUESTION: Well, if -- if you say there's no need for a warning, then do you think the Ninth Circuit was mistaken here to require a warning?

MS. BASSIS: No, I don't, not under the circumstances of this case. First of all, the Ninth Circuit's stay procedure is somewhat unusual. It makes it incumbent upon the prisoner litigant to withdraw his unexhausted claims and then renew a motion to stay. So the motion to stay is at the defendant's or the petitioner's election.

But without being apprised of that peculiar procedure, Mr. Ford was not informed as to his choice of

options with regard to amendment. The only choices he was given were the two choices under Rose: delete the unexhausted claims and proceed on the exhausted or dismissal of the entire petition without prejudice, an option which was illusory at the time it was given to him because of the running of the limitations period.

57 percent of the habeas petitions filed are dismissed for want of exhaustion.

QUESTION: Were there -- were there any potential equitable tolling arguments open to him other than based on the so-called misleading advice?

MS. BASSIS: Well, I believe that there were.

QUESTION: In other words, was it absolutely clear at the time that he could not come back?

MS. BASSIS: Well --

QUESTION: Do you agree he had no -- no basis to argue that he could come back?

MS. BASSIS: Well, the issue is that he had a potential argument, but I don't know what Mr. Ford knew at that time in terms of the availability of equitable tolling. He certainly didn't know about the availability of filing a contemporaneous writ petition in State court in order to toll the limitations period. Had he done so, most assuredly he would not have pursued the option of motions to stay, which he filed contemporaneously with his

writ. I doubt that he also knew about equitable tolling, statutory tolling, or really the statute of limitations and how that was calculated. All he knew is that there was 1 year, and he filed in time.

But he also did so by simultaneously filing a motion to stay. However, without -- or without knowledge at the time that court made a judicial disposition of Mr. Ford's petitions, that he could elect a stay procedure, the court -- he -- he merely went with the option of dismissal without prejudice. That decision was not informed absent further information about the availability of the stay.

QUESTION: What should be the rule if the habeas petitioner files in -- in Federal habeas on claims one, two and three, and those have already been exhausted? But then a week after he files in the Federal court, makes a timely filing, he says, my heavens, I have claim number four, and he files that in the State court. Does that stay claims one, two, and three in the Federal court?

MS. BASSIS: Well, if it's filed untimely, I don't know how it would absent a stay unless the court granted a stay --

QUESTION: So the court -- so the Federal court always has to file a stay when it knows that claim four has just been filed in the State court?

MS. BASSIS: No. I believe that a court, when it determines that a petition is unexhausted, may on its own -- has the discretionary authority, taking many factors into consideration, to grant a stay on its own and delete the unexhausted claims.

QUESTION: But the -- the Ninth Circuit opinion suggests that a district court really doesn't have discretion. It's -- to me it suggested that the district court had to do this.

MS. BASSIS: Under Ninth Circuit precedent, the -- the Ninth Circuit believed that a district court lacks discretion to stay a mixed petition. I actually believe that courts have broader authority than what the Ninth Circuit held. The discretionary authority to stay is part of the inherent power of the courts, and courts routinely stay matters pending before them while there -- a determination of independent matters relating to the case are being made.

QUESTION: So if district judge had advised the petitioner of the Ninth Circuit law, the district judge would have been wrong.

MS. BASSIS: I'm sorry. Pardon?

QUESTION: If the district court -- based on what you say, if the district court had advised the petitioner of what the Ninth Circuit law was, the district

court would have been wrong, because you say the Ninth Circuit is wrong.

MS. BASSIS: I'm not -- I'm saying that the Ninth Circuit followed its own precedent, but I'm saying that the power to stay is broader than what the Ninth Circuit precedent currently allows. I do believe the courts --

QUESTION: Well, all this -- all this seems to me a good argument that the -- that the district courts shouldn't have to advise clients of their rights. It's the -- the job of the client to figure that out.

MS. BASSIS: I believe that that's impossible without further information regarding the choices under Rose. The reason the Court ruled as it did is because pro se -- 93 percent of the habeas petitioners are proceeding in pro se. Mindful of the fact that pro se litigants require certain procedural protections, the Court stepped in and said that ceratin advisements are required in -- in order to -- to assure that there is no unwarranted forfeiture of the right to Federal --

QUESTION: But it's -- it can be a very complicated question to know what time is left to make a State claim. The court is often not in a -- a good position to even know that information as required by the Ninth Circuit.

MS. BASSIS: Justice O'Connor, I agree with you, but I'm not advocating that the court calculate the limitations period. What I'm requesting is not --

QUESTION: Well, the -- the Ninth Circuit ruling seems very broad. Are -- are you suggesting that some lesser notification would be adequate?

MS. BASSIS: I'm -- I'm requesting a specific notification, not an advisement, but a warning, and I believe that there is a distinction. But what I'd propose that the circuit courts be required to give, where a mixed petition is filed, is after the Rose options are afforded to the prisoner, they also be told prisoners have a 1-year period, generally starting when their conviction becomes final and excluding the time when a State post-conviction application is pending, in which to file a Federal habeas corpus petition, absent cause for equitable tolling. Before deciding to dismiss your petition to exhaust claims, you should determine whether your 1-year period has expired and, if not, how much time remains.

It requires no additional burden for the district court to give this kind of admonition or this kind of warning. The court is not required to calculate the limitations period, and I agree with Your Honor. At the time that this decision is made, the court probably doesn't have a sufficient record to make -- to undergo the

complex task of computing the limitations period and making that decision.

QUESTION: If that's so --

QUESTION: That's the problem --

QUESTION: If -- if that's so, Ms. Bassis, why do you not agree that the Third Circuit's approach in Crews v. Horn is the right one? It's the simplest, just to say you don't have to tell the -- the petitioner, you don't have to read any particular litany. You just say we'll put the Federal complaint on ice while he goes off to -- to the State court.

MS. BASSIS: Well, I agree with Your Honor completely. And in fact, I don't believe that warnings are necessary if stays are permitted. In fact, it would make the stays essentially superfluous, but a stay is -- a warning is necessary if there is no stay.

Now, one of the cases cited by the petitioner Slayton was cited for the proposition that the court lacks authority to stay a mixed petition. Slayton is distinguishable in that, first of all, it didn't involve a mixed petition. It involved a singular claim. And the State in that case argued that the claim, the senility of the trial court judge, was a matter, a sensitive matter, exclusively of State court concern. So for that reason, this Court held that a stay was inappropriate. Yet, at

the same time, it acknowledged --

QUESTION: Before -- before we -- we launch into the -- into the stay alternative, I -- I'd like to finish up the -- the advisement alternative. This is not the only situation in which pro se litigants would profit from some good advice from the court. We generally do not require the courts to -- to act as counsel for the litigants, if only for the reason that they may give wrong advice, in which case you will -- you -- you will have an equitable -- an equitable claim. What -- what is distinctive about -- about this area that -- that we should depart from that rule?

MS. BASSIS: Because of the right of Federal habeas corpus review. This is a very, very significant right, one of the last equitable bastions that remain available to a litigant to challenge their State court conviction.

QUESTION: Well, there are a lot of other significant rights that -- that pro se litigants bring before courts, and -- and I'm -- I'm just resistant to the idea that, in addition to the requirements that the Constitution imposes to give counsel to -- to litigants, we're -- we're going to add on that a -- a requirement in some situations that the court act as counsel for the litigants.

MS. BASSIS: I understand. However, this Court already requires advisements in certain limited instances in recognition of the fact that pro se litigants' rights require careful protection.

QUESTION: Well, what is that? I -- I think we -- we do it where it's necessary to assure, for example, the -- the constitutional validity of a confession.

MS. BASSIS: That's true, but this Court --

QUESTION: But that's -- that's not a matter of, you know, legal advice as to how you should proceed with your litigation.

MS. BASSIS: That's true, and that constitutes an advisement as distinguished from a warning. However, in United States v. Castro, this Court did require certain limited advisements when recharacterizing a motion for relief.

QUESTION: But that was -- that was when the court was doing something on its own.

MS. BASSIS: True, and this is -- this -- the advisement or the warning that I'm requesting is done in order to effectuate the choices under Rose.

QUESTION: Well, I think it --

QUESTION: Those are two different things.

QUESTION: I think it's really a -- a major departure from -- from the -- the position that the Court

in -- in common law jurisprudence has occupied. It would be the first time that I know of where, not on -- not because of something the court itself is doing, the court has to provide legal advice to a -- to -- to an indigent prisoner.

MS. BASSIS: Well, in light of Rose v. Lundy, I believe that the options afforded are misleading. And this Court never -- never intended that those options be exercised in a manner that would forfeit the right -- result in a forfeiture of the right to Federal review.

QUESTION: How do you know what the Court intended in Rose v. Lundy, other than reading the opinion?

MS. BASSIS: Well, it appears that -- that beginning with the line of cases, Rose starts a line of cases. Two other significant ones are this Court's opinions in Slack and in Martinez which affirmed a right of return following exhaustion. And it said that that right of return, where the first petition was filed without a determination on the merits because either --

QUESTION: But that was an -- was an interpretation of AEDPA.

MS. BASSIS: Yes, exactly. But they were not -- but the ensuing application was not deemed to be second or successive and it approved a right return.

In this -- in this particular case, the

operation of -- the impact of AEDPA on Rose v. Lundy operates as a bar to the right of return in the event the defendant files a mixed petition.

QUESTION: Well, but it -- it certainly makes it more difficult for the defendant. But, you know, Congress wasn't trying to make things easy for defendants in AEDPA.

MS. BASSIS: That's true, but Congress also never prohibited the choices that have been afforded under Rose. And in order to implement those choices, I believe an additional sentence is necessary and is made critical by the adoption for the first time of a 1-year limitations period in order to ensure that prisoners do not lose this very important right to Federal writ relief.

As far as the operation of the relation back doctrine under rule 15(c), I believe that that was a remedial device that was adopted by the Ninth Circuit in order to restore Mr. Ford --

QUESTION: But there wasn't a second petition there to which it could relate back. I don't see how we could possibly sustain that --

MS. BASSIS: That's true.

QUESTION: -- order of the Ninth Circuit. That just came out of no place. There wasn't anything to which it could relate back.

MS. BASSIS: Unless, of course, one follows the

rationale of the opinion, which is that the petitions should have been stayed not dismissed, and therefore to restore Mr. Ford to the position he was in previously --

QUESTION: But there wasn't a stay order. I mean, that -- that's just manufacturing something. In this case the petitions were dismissed.

MS. BASSIS: That's true, and other cases faced with that kind of situation have either used their equitable authority to reinstate the improperly dismissed petitions or have used the doctrine of nunc pro tunc, either of which would be available.

In any event, the Ninth Circuit --

QUESTION: Well, why would -- I mean, have we sanctioned the use of, quote, nunc pro tunc,、closed quote, in similar situations to this?

MS. BASSIS: In Anthony v. Cambra, that's what the Ninth Circuit used.

QUESTION: I said have we.

MS. BASSIS: No, I don't believe it has, Your Honor, and I believe the reason for that is because this is a relatively -- this case -- this is the first case to have gone this far.

QUESTION: But in any case, your client would be in exactly the same position that the Ninth Circuit tried to put your client in if the Ninth Circuit had simply said

a -- a mistake was made, either because there was misleading advice or because there was a failure to give the advice that we say should have been given, and we're simply going to put him back in the position that he would have been in had there not been that mistake, i.e., put him back with a petition before the district court just as there was within the -- the 1-year period.

MS. BASSIS: Yes, taking --

QUESTION: So -- so the relation back is simply -- well, it's -- I guess it's one way of explaining something that the court, on your view simply under its power to correct an error, could have done.

MS. BASSIS: Exactly, Your Honor.

QUESTION: On your view, Ms. Bassis, would there be any disincentive for a litigant to bring a mixed petition, to come to the Federal court first rather than to go to the State courts, which is certainly what -- what AEDPA contemplates? What -- what disincentive is there?

MS. BASSIS: Well --

QUESTION: What does he -- what does he have to lose by just marching off to Federal court with all his claims?

MS. BASSIS: Well, first of all, he loses precious time. Most of these litigants believe that they're -- they've been unfairly convicted. Many are

serving life terms, and they want to have -- they're interested in expeditious resolution of their claim. They want to do it right. They want to have their claim heard on the merits as quickly as possible. They're not interested in delay. And so, they would not choose a procedure that would cause them to return to State court. It's not in their interest to do so.

QUESTION: Well, it isn't they're in their interest, but they're not lawyers.

MS. BASSIS: That's --

QUESTION: And they say, you know, I don't know which ones need exhaustion and which ones don't. I'm just going to dump the whole thing onto Federal court. Won't that happen in every situation? And is that -- is that what AEDPA contemplated?

MS. BASSIS: I don't think AEDPA contemplated that -- well, in fact, I believe AEDPA recognized the possibility that mixed petitions would be filed.

And indeed, the exhaustion requirement is an extremely difficult one both for lawyers and pro se litigants alike. By the time a judicial determination has been made, on average 263 days go by after that Federal writ petition has been filed. So you can easily have a situation where your pro se litigant filed well in advance, maybe 3 months after the limitations period

started, only the -- to find that by the time he -- a judicial determination is made, that he's failed to exhaust the --

QUESTION: Would -- would you have a reason to object to a -- a modification of what the Ninth Circuit was talking about? And instead simply of this kind of automatic stay and -- and abeyance procedure, there were engrafted on it a further condition, and the condition be that before the -- the stay be granted and -- and the petition kept in abeyance, the -- the defendant would have to show that there was some good reason for or excuse for his failure to exhaust the -- the unexhausted claims. That would accommodate -- the reason I raise it is that would accommodate the -- the issue, at least in part, that Justice Scalia is raising and it would address the case that your answer didn't address, and that is, of -- of the prisoner under a death sentence who does not want fast action at all. He wants the slowest action possible. Would there be an objection to -- to engrafting that further condition of a defendant must excuse failure to the Ninth Circuit's procedure?

MS. BASSIS: No. In -- in fact, I believe that that condition is inherent in a court's discretionary authority to stay. It can take into consideration a -- a variety of factors, including whether or not the

petitioner has been diligent in exhausting. The reason --

QUESTION: Justice Souter is suggesting that it must take into account that factor.

MS. BASSIS: I believe it already does, but I -- I would have no problem with that.

QUESTION: What -- what would be a good excuse? That I -- I didn't know enough?

MS. BASSIS: No.

QUESTION: Would it -- would it be an excuse that I'm not a lawyer and I didn't realize I had to exhaust?

MS. BASSIS: No. I believe one of them would be that I didn't receive my transcripts from my State appellate attorney, and I didn't know what claims were there because I didn't receive the information. The other -- one of the other reasons --

QUESTION: He's bringing the claim in Federal court.

MS. BASSIS: Yes.

QUESTION: How could he not know the claim? He's bringing it in Federal court, and -- and the objection is you should have brought it in State court first. What possible excuse could he have? I mean, the normal excuse is going to be, you know, I'm just -- I'm just a simple prisoner. I'm not a lawyer. I -- I had no

idea I had to exhaust.

MS. BASSIS: Well, for example, a defendant may have had a direct appeal, but it doesn't mean that other claims such as ineffective assistance of counsel claims, which normally must be raised in a writ, have been pursued at all. This requires reliance on extrajudicial evidence. Normally counsel, at least in California, appointed counsel in some districts, is not authorized to file a writ petition without express permission of the court of appeal. Very often those counsel don't pursue that, and therefore the writable issues, the -- which rely on extrajudicial evidence, have not been developed, and they have -- those claims have, therefore, not been exhausted. So there are a number of reasons why a pro se prisoner litigant may find that certain viable claims, meritorious claims, have not been exhausted --

QUESTION: Well, I don't -- I don't certainly see that condition in -- in the procedure that the Ninth Circuit has adopted, that it -- there has to be some justification for not having exhausted. Is -- is that set forth in -- in the Ninth Circuit's procedure?

MS. BASSIS: No, it isn't, but Your Honor --

QUESTION: That's new to me.

MS. BASSIS: -- a stay is discretionary, and in deciding whether or not a stay is appropriate, the court

takes into factors such as a petitioner's dilatoriness, whether or not they're attempting to evade a time limitation, whether or not their efforts are in good faith. I believe that these are all factors that the district courts already are mindful of.

QUESTION: But you -- and you disagree then with the Ninth Circuit which said, in effect, that it is -- the district courts don't have discretion. They must grant a stay.

MS. BASSIS: No. I -- I disagree with the Ninth Circuit's opinion that it lacks authority to stay a mixed opinion. I believe that all district courts have the inherent authority to stay a mixed opinion. And in fact, there's considerable authority for it based upon this Court's own precedent.

QUESTION: But perhaps you and I don't read the Ninth Circuit's opinion the same way insofar as the -- the authority of a district court to -- in its discretion to turn down a stay application. I thought the Ninth Circuit said that there was no discretion.

MS. BASSIS: No. I believe that what the court said, in a circumstance -- it -- it -- I agree with Your Honor. On one hand, it appears to speak in mandatory terms. On the other hand, I believe that the issue that there may potentially be a forfeiture of the right to

Federal review is a factor which the district court must also take into consideration in deciding whether or not to enter a stay. So it's just one additional factor. While it did appear that the Ninth Circuit spoke in mandatory terms, I don't believe it's mandated, the -- the decision of whether or not a district court should stay a mixed petition.

And I believe it also has authority under this Court's decisions in Nelson and in Wade to stay an unmixed petition, which I know is not the issue before us with regard to this case.

QUESTION: Can you give us any idea, perhaps anecdotally, about the number of -- of times we have mixed petition arguments or questions about mixed petitions? Is it 10 percent of the time, do you think, or 90 percent of the time? I see them all the time.

The reason I ask is you say the district judge has discretion to stay and abey in every case. This is a -- a huge undertaking by the judicial system to make AEDPA work, and AEDPA was supposed to simplify things.

MS. BASSIS: Well, AEDPA was supposed to simplify things, but it was adopted 8 years ago and we're still litigating nearly every sentence of AEDPA. So I wish it had simplified things, but unfortunately, it is not a simple statute to understand.

QUESTION: Do -- do you have any idea of the -- the number of instances in which there's an allegation of a mixed petition?

MS. BASSIS: I know that 57 percent of the -- of cases are dismissed for failure to exhaust.

QUESTION: About 57?

MS. BASSIS: 57.

QUESTION: And is this in the Central District or the California or all over?

MS. BASSIS: I think it's all over, and in fact, the statistics comes from this Court's opinion in Duncan, and I believe it's Justice Breyer's opinion where he cites to the statistics.

QUESTION: I think it was something like -- I got it from some official source -- said there were about two-thirds were actually filed in the wrong court, namely the Federal court. And I think it was 57 percent of those that were dismissed.

MS. BASSIS: Right, for failure to exhaust.

QUESTION: That's where it came from. That's what --

MS. BASSIS: So what I am proposing is that the Court permit -- approve a stay of mixed petitions, but if not, that it gives a warning to pro se litigants about how the Rose choices are effectuated, that it gives the Rose

choices and then it continues to apprise the defendant about the running of the 1-year limitations period, and that they essentially must calculate the limitations period on their own.

If the Court has no further questions.

QUESTION: Thank you, Ms. Bassis.

Mr. Roadarmel, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF PAUL M. ROADARMEL, JR.

ON BEHALF OF THE PETITIONER

MR. ROADARMEL: With the Court's permission, I'd like to make four brief points.

The proof is in the pudding regarding stay and abeyance and what we're experiencing in California. We're experiencing greater delays since the enactment of AEDPA than we ever experienced before because of stay and abeyance and relation back, particularly in capital Federal habeas cases.

We make mention in footnote 1 of our reply brief of a capital Federal habeas case pending in the Central District Court of California called Reno v. Woodford. In that case, the district court issued a stay of the purged petition on May 7th, 1999 for the ostensible purpose of allowing the petitioner to exhaust his State court remedies. To date, no State court exhaustion petition has been filed. None is on the horizon. But under stay and

abeyance and relation back, whenever one is filed and the claims are exhausted and added back into the State petition, those claims will be deemed timely by the district court, notwithstanding the fact that at this point in time, at best, they will be presented for exhaustion in State court more than 5 years after the expiration of AEDPA's limitation period.

The second point is that Ford in this case knew that the 1997 petitions he filed contained unexhausted claims. He admitted as much to the district court in connection with our motion to dismiss those petitions. That's found at pages 56 to 57 and 75 of 78 of the joint appendix. Ford purposely filed mixed petitions. He knew of the limitation period as well because he indicated in filings to the district court that he was in a hurry to get his 1997 petitions in in time so that he would have them before the court prior to the expiration of the limitation period.

What stay and abeyance does is reward petitioners like Ford who file admittedly mixed petitions knowing full well the identity of the unexhausted claims that they're asserting. If they're aware of those unexhausted claims, there's no reason why those petitioners should not have and could not have presented those claims in State court first, and they would have

received a proper benefit under AEDPA by doing so. They would have exhausted the claims so the Federal court could consider them on the merits conceivably if there wasn't some kind of default that was applicable, and they would also toll the limitation period during the pendency of that State proceeding.

Ford was under the misapprehension that his Federal filing tolled the limitation period in much the same way that the petitioner in Duncan was under the misapprehension that his first mixed petition tolled the limitation period in that case as well. We know from Duncan v. Walker that it does not.

Finally, advice regarding AEDPA's limitation period, to be meaningful at all, to be more than just a meaningless gesture, has to rely on specific documents and has to provide specific information that a district court is simply in no position to provide at the time a mixed petition is dismissed. The only documents a district court typically has before it at that time are documents relating to filings by the petitioner in the State supreme court. The allegations contained in those documents are then compared against the allegations in the Federal habeas proceeding for the purpose of determining whether the claims are exhausted. The court does not have before it the entire record of proceedings.

And even if it did, there are certain circumstances that would warrant tolling that would not be contained in those documents and the court would not be able to make any kind of a reasoned decision or give any kind of reason or correct advice regarding the impact of the limitation period on any unexhausted claims.

Stay and abeyance we believe vitiates AEDPA by rendering largely irrelevant the limitation period, rendering the State court tolling provision near surplusage, and in effect, encouraging petitioners to file mixed petitions in Federal court instead of presenting their unexhausted claims in State court first.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Roadarmel.

The case is submitted.

(Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.)